RECORD
AND
BRIEFS

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No. 16-369

In the Supreme Court of the United States

**COUNTY OF LOS ANGELES,
DEPUTY CHRISTOPHER CONLEY
and DEPUTY JENNIFER PEDERSON,**

Petitioners,

—v—

ANGEL MENDEZ and JENNIFER LYNN GARCIA,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE NINTH CIRCUIT'S "PROVOCATION" RULE SHOULD BE OVERTURNED.

The Ninth Circuit's "provocation" rule puts the lives of officers at mortal risk by imposing civil liability for a *reasonable* use of force. An officer who has *not used excessive force* but who has nevertheless otherwise violated an individual's constitutional rights, must refrain from defending himself even if his life is threatened or be held financially liable in a 42 U.S.C. § 1983 action. According to the Ninth Circuit, the rule required the police officers here to reflect upon whether their decision to search the Respondents' shed was constitutional during the split-second moment when they were faced with what reasonably appeared to be a deadly threat, because they "created a situation which led to the shooting." (App.22a-23a.)

As the "provocation" rule is plainly improper, Respondents attempt to minimize its role in this case, contending "the Ninth Circuit did not find liability on an excessive force claim," and therefore there is no merit to Petitioners' argument that the "provocation" rule contravenes *Graham*. (Opp.Br.8.) To the contrary, the officers in this case were specifically found liable for their *reasonable* use of force under the Ninth Circuit's "provocation" rule. "The court concluded that given Conley's reasonably mistaken fear upon seeing Mendez's BB gun, the deputies did not use excessive force when shooting the Mendezes, *see Graham v. Connor*, 490 U.S. 386 (1989), but the depu-

ties were liable for the shooting under our circuit's provocation rule articulated in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994)." (App.6a.) The approximately $4,000,000 in damages awarded in favor of Respondents were based solely on the Ninth Circuit's "provocation" rule. (App.52a-54a, 135a-136a.) As the "provocation" rule violates *Graham*, it cannot stand.

A. There Is a Plain Conflict Between the Ninth Circuit's Provocation "Rule" and the Law in Other Circuits.

Surprisingly, Respondents argue there is no conflict with the Sixth Circuit or Third Circuit, despite the fact that in *Sheehan*, this Court explicitly recognized the Ninth Circuit's "provocation" rule has been "sharply questioned" by other circuits. *City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1776 n.4 (2015). Indeed, the Sixth Circuit has specifically rejected the doctrine.

Notably, Respondents fail to acknowledge the cases cited by Petitioners setting forth the law of the Second, Fourth, Fifth, Seventh and Eleventh Circuits, which directly conflict with the Ninth Circuit's "provocation" rule. Those circuits hold pre-seizure conduct should not be considered in evaluating the reasonableness of an officer's use of force.

Moreover, Respondents misstate the law of the Sixth and Eight Circuits. In *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007), the Sixth Circuit specifically rejected *Billington* and the "provocation" rule. *Id.* at 406; *see also Claybrook v. Birchwell*, 274 F.3d 1098, 1104 (6th Cir. 2001) (the Sixth Circuit's "segmenting" analysis requires the use of deadly force to be deter-

mined separately from prior actions taken by the officers).[1]

Likewise, the Eighth Circuit only scrutinizes the seizure itself, and not the events leading up to the seizure.[2] *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). In *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995), the Eighth Circuit rejected the plaintiff's argument that the officers' conduct prior to the seizure caused the circumstances which ultimately led to the need to use deadly force, as such an analysis violated *Graham*. *Id.* at 648. The Court criticized *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) for this reason. *Id.* at 649 n.3.[3]

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[1] In *Estate of Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008), cited to by respondents, the Sixth Circuit held summary judgment was improper as triable issues of fact existed regarding whether the officers *reasonably believed they were in danger* prior to shooting the decedent, which is not an issue here, as the trier of fact specifically found the officers reasonably feared for their safety. (App.108a.)

[2] Respondents cite to *Ribbey v. Cox*, 222 F.3d 1040 (8th Cir. 2000), wherein the Eighth Circuit upheld the denial of summary judgment as, again, there was a factual dispute regarding the threat to the officer and whether the officer reasonably believed the decedent was reaching for a weapon. *Id.* at 1042-43.

[3] Nevertheless, in *Starks*, again, the Court was analyzing whether the officer *reasonably believed the suspect posed a threat*, by determining whether the suspects' vehicle moved toward the officers before or after the officers were in harms' way. *Starks*, 5 F.3d at 234. Here, it is undisputed the officers reasonably believed Mr. Mendez posed a deadly threat. (App.108a.) Also, following *Starks*, the Seventh Circuit stated force is measured at the time it is applied, without considering the propriety of the officers' actions leading up to the force.

Notably, Respondents concede, as they must, that the Court of Appeals are in conflict regarding whether pre-shooting conduct should be considered in determining the reasonableness of the force. (Opp.Br.17 ("Over time, the Circuits can be expected to reach consensus on that point, and the Court should allow the process to continue.").) The "provocation" rule requires a plaintiff to show: (1) *that an officer intentionally or recklessly provoked a violent confrontation*, and (2) the provocation was an independent Fourth Amendment violation. *Billington v. Smith*, 292 F.3d 1177, 1189-90 (9th Cir. 2002). Whether an officer's conduct which provokes a violent confrontation should be considered in analyzing whether the force was reasonable at the moment of the seizure, is the identical issue discussed by the foregoing cases regarding whether an officer's pre-seizure conduct should be considered in determining the reasonableness of force. If not, the "provocation" rule cannot stand.

Moreover, even if pre-seizure conduct can be considered in the force analysis, the trier of fact must still be allowed to determine whether the force was excessive under the totality of the circumstances. The severity of the threat is a crucial factor in determining the reasonableness of a use of force, and the officers in this case were faced with what appeared to be a rifle pointed directly at them. However, although the court acknowledged the officers reasonably believed they faced a deadly threat, instead of analyzing the reasonableness of the force based upon the totality of

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Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994).

the circumstances, liability was specially imposed under the "provocation" rule. (App.52a-54a, 135a-136a.)

II. Review Should Be Granted to Settle Whether the Qualified Immunity Analysis Must Be Tailored if the "Provocation" Rule Is Upheld.

As the "provocation" rule imposes liability against an officer for a *constitutional use of force* if the officer intentionally or recklessly provokes a violent confrontation, the qualified immunity analysis must be tailored, and a reviewing court must determine: (1) whether the officer committed a predicate constitutional violation; (2) whether *every* reasonable officer in the position of the defendant would have known his conduct in committing the predicate constitutional violation was unlawful; and (3) whether *every* reasonable officer in the position of the defendant would have known his conduct would provoke a violent confrontation.

Respondents focus their argument upon whether the law was clearly established such that every officer in the defendant's position would have known his conduct was unlawful in relation to the predicate constitutional violation of the warrantless entry only, which is not the issue presented by Petitioners.

Moreover, the cases cited by Respondents in addressing qualified immunity, *Sledd v. Linsday*, 102 F.3d 282 (7th Cir. 1996) and *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), do not involve cases where damages were imposed for a *reasonable* use of force. Rather, those cases involve qualified immunity in failure to "knock and announce" cases, which is not

at issue here.[4] Respondents' repeated argument that the officers should have known their "unannounced" entry may lead to the need to shoot the homeowners who armed themselves against possible intruders, is foreclosed by the Ninth Circuit's ruling that the officers are entitled to qualified immunity from the "knock and announce" claim.

In addition, Respondents argue qualified immunity should not be argued from the defendants' point of view. (Op.Br.26 n.6.) Of course, qualified immunity is an objective assessment, from the officer's point of view and the specific circumstances facing him at the time of the incident. *Sheehan*, 135 S. Ct. at 1774 (the contours of the right must have been sufficiently definite that any reasonable official *in his shoes* would have understood that he was violating it). Moreover, this Court has not set the contours for liability under the "provocation" rule. *Compare Taylor v. Barkes*, 135 S.Ct. 2042, 2044 (2015) (per curiam) (as the Supreme Court had not discussed parameters of right, law was not clearly established).

Furthermore, the Ninth Circuit law is not clearly established, given the earlier cases holding a defendants' conduct must have escalated a situation and provoked a violent response; an earlier constitutional violation, in of itself, is insufficient to establish liability. *Billington*, 292 F.3d at 1189-90; *Duran v. City of*

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[4] *Sledd*, 102 F.2d at 288 (court assessed whether officer was entitled to qualified immunity for use of force, *assuming* officer had right to self-defense following unlawful entry for failing to knock-and-announce his presence); *Yates*, 942 F.2d at 447 (officer acted unreasonably prior to shooting and failed to identify himself in dark hallway).

Maywood, 221 F.3d 1127, 1131 (9th Cir. 2000) (the defendant's conduct must have caused an *escalation* which led to the use of force). However, in *Mendez*, instead of determining whether the officers intentionally or recklessly provoked a violent confrontation, the Ninth Circuit focused only upon whether the officers intentionally or recklessly committed the predicate violation of the warrantless entry. Yet, not every constitutional violation should reasonably provoke a violent confrontation with a resident.

Here, there was no interaction or escalation of an event between the deputies and the Respondents prior to the need for the officers to use force to defend their lives—the officers did not even cross the threshold of the shed prior to seeing the gun. Not *every* reasonable officer in the position of the defendants would have believed their conduct would provoke a violent confrontation and, in fact, as Respondents concede, it did not. (Opp.Br.26 n.6.)

III. DAMAGES FROM A *REASONABLE* USE OF FORCE ARE NOT *PROXIMATELY CAUSED* BY AN UNLAWFUL ENTRY.

As the "provocation" rule clearly conflicts with the proper manner in which to determine whether liability should be imposed for a use of force, Respondents argue the damages should be upheld as being proximately caused by the warrantless entry. Respondents argue the district court's finding of proximate cause cannot be set aside unless it was clearly erroneous. (Opp.Br.11.) *However, the district court did not find Respondents' damages were proximately caused by the warrantless entry, rather, the district court awarded damages based on the*

"provocation" rule. (App.52a-53a, 135a-136a.) The damages found to have been proximately caused due to the warrantless entry amounted to $1.00. (*Id.*) Accordingly, there is no merit to Respondents' argument.

Furthermore, the Fourth Amendment protects the rights of individuals to be free from a warrantless search of their home, as well as the right to be free from an unreasonable seizure of their person. The shooting of an individual by a police officer is a seizure of his person, and is not a foreseeable risk from a warrantless entry into the person's home. Respondents argue officers should recognize that if they make warrantless entry into a home, that conduct in of itself justifies the residents to shoot them. (Opp.Br.18-19.) However, a homeowner may not resist an unlawful entry into his home, simply because of its unlawfulness. *See also James v. Chavez*, 511 Fed.Appx. 742, 747 (10th Cir. 2013).

It is not foreseeable that a warrantless entry alone would immediately cause the residents therein to aim weapons at police officers and, indeed, that is not what happened in this case. Rather, Mr. Mendez was moving his gun as he believed his friend was approaching, at the precise moment when Deputy Conley saw what appeared to be a rifle aimed directly at him. While Respondents argue Mr. Mendez was "startled" (Opp.Br.11), he was not aiming his gun at the deputies and their conduct did not "provoke" him to threaten the officers.

Every event has many causes, and only some of them are proximate, as the law uses that term. In *Paroline v. United States*, 134 S.Ct. 1710 (2014), relied

upon by Respondents, this Court explained that to say that one event was a proximate cause of another means that it was not just any cause, but one with "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 1719 (citations omitted). Proximate cause is stricter than cause-in-fact, and "is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Id.* (citing 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29, p. 493 (2005)). For example,

> Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29, cmt. (d)(3) (2010).

Similarly, the risk of entry without a warrant is unwarranted government intrusion into the privacy of one's home. However, a warrantless entry, in of itself, does not inherently carry a risk of use of

excessive force by a government official, which is a separate harm which must be analyzed separately. *Bodine v. Warick*, 72 F.3d 393, 400 (3d Cir. 1995). *Even farther removed from the foreseeability analysis is the risk that someone inside a home will be moving a gun used for pest control, at the very moment an officer enters a home without a warrant.* Like the preceding example, the risk here was simply too attenuated from the alleged wrongful conduct and was not foreseeable. Thus, as a matter of law, proximate causation cannot be established for the $4,000,000 in damages awarded for Respondents' injuries from the shooting, as a result of the warrantless entry.

There is a split of authority regarding whether, following an unlawful entry, an officer's need to use reasonable force is a superseding, intervening event, cutting off the chain of causation for damages caused by the use of force. As indicated in the petition, the majority of circuits hold that officers who unlawfully enter a home are *not* liable for harm caused by a reasonable use of force, which is a superseding cause of the harm. *See e.g., Lamont v. New Jersey*, 637 F.3d 177, 186 (3d Cir. 2011) ("as long as 'the officer['s] use of force was reasonable given the plaintiff's acts, *then despite the illegal entry*, the plaintiff's own conduct would be a [superseding] cause that limited the officer['s] liability.'") (emphasis added); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000) (same); *see also Estate of Sowards v. City of Trenton*, 125 Fed.Appx. 31, 42 (6th Cir. 2005).

Respondents misinterpret the Third Circuit's earlier decision in *Bodine*, which holds that damages stemming from an unlawful entry *do not* include

damages resulting from a *reasonable* use of force. The Court held that even if the officers' entry was unlawful, they would only be liable for the harm "proximately" caused by their illegal entry. *Bodine*, 72 F.3d at 400. However, the officers would not be liable for harm produced by a "superseding cause." *The Court stated the officers "certainly" would not be liable for harm that was caused by a use of reasonable force. Id.* The Court emphasized the determination of liability based upon the illegal entry versus the excessive force *must be kept separate. Id.* "The harm proximately caused by these two torts may overlap, *but the two claims should not be conflated.*" *Id.* at 401 (emphasis added). The Third Circuit stated it was up to the jury to determine the harm proximately caused by the unlawful entry. *Id.* at 400. Here, the trier of fact determined the damages proximately caused by the warrantless entry were $1.00.

The Court in *Bodine* relied upon *George v. Long Beach*, 973 F.2d 706 (9th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993), wherein the Ninth Circuit found that although the officers were liable for nominal damages due to a warrantless entry into the plaintiff's home, they were not liable for the compensatory damages which were caused by the officer's use of force after entering the home. *Bodine*, 72 F.3d at 400.

Respondents rely upon cases from the Tenth Circuit which indicate an officer could be held liable for injuries from a use of force following an unlawful entry, *which directly conflict with the cases set forth above.* (Opp.Br.13 (citing *Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016) and *Attocknie v. Smith*, 798 F.3d 1252 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 2008

(2016).) Respondents attempt to argue the majority cases should be disregarded, as they involve situations where the homeowner knew it was police who were entering the home. However, a gun aimed by a homeowner at a police officer who the homeowner believes to be an intruder, is no less dangerous to the officer. *As recognized in* Pauly, *foreseeability for proximate causation must be determined from the actor's point of view. Pauly*, 814 F.3d at 1066-67. Moreover, again, the officers are immune from claims they failed to knock and announce their presence, in any event.

CONCLUSION

Petitioners-Defendants respectfully submit the petition for writ of certiorari should be granted.

Respectfully submitted,

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